## Approach Point Cross-Examination

An Organized Method for Advancing the Case Theory to the Jury in Cross-Examination





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#### The National District Attorneys Association Approach Point Cross-Examination Method

#### James M. Dedman Director of Academics NDAA

- A. A number of years ago the NDAA developed a method or process for organizing cross-examination.
  - 1. The focus of the organization is on advancing the case theory.
  - 2. Cross-examination of defense witnesses comes after the entire prosecution case has been put before the jury. Natural erosion of memory has begun setting in on the jurors.
  - 3. The trial lawyer cannot stop the trial and give a refresher opening statement so that the jury will keep the salient facts of the prosecution case theory in mind for the rest of the trial.
  - 4. Through the defense witnesses the jurors are receiving a competing case theory, and they may have trouble compartmentalizing the competing facts for purposes of distilling the truth.
  - 5. When the trial lawyer is "impeaching" an opposing witness, it necessarily involves "repeating" some of the opposing case theory in order to eventually illustrate why it is not credible or why it is improbable. The jury is then hearing the telling and possible retelling of the opposing case theory while forgetting significant points of the prosecution case theory.
  - 6. When a defense witness takes the stand and becomes available for cross-examination, the trial lawyer should remember that it is an opportunity to advance his/her case theory.
  - 7. It is difficult to get a person to shake hands with you if you first slap that person in the face. The same principle is true with cross-examination. It is easier to get concessions *before* any stinging impeachment.
  - 8. Sometimes, the value of the concessions received outweighs the need to do any impeachment. Remember, the jury will not remember everything as well as the lawyers do. Some of your fears may be unfounded.

- B. The lawyer in trial is always working toward closing argument.
  - 1. Argument can be broken down into several components.
    - a. Attention step (the first minute or so to get their attention)
    - b. Core argument
      - 1. Relevant Instructions
      - 2. Facts-to-law or Law-to-facts
    - c. Motivational segment and/or exit line.
  - 2. The structure of the core argument follows traditional argument format as we follow it with family, friends, etc.

Main Argument Point 1
Topic/Subject Point 1
Details proving Topic/Subject Point 1
Topic/Subject Point 2
Details proving Topic/Subject Point 2
Topic/Subject Point 3
Details proving Topic/Subject Point 3
Main Argument Point 2
[Etc.]

- 3. The trial lawyer must also remember that two things are being argued before the jury about the facts.
  - a. "My case theory wins because..." (Facts prove the defendant guilty of the charge—*primary argument*) Note that factual concessions by opposing witnesses are used to prove the prosecution case theory and would go in the primary argument.
  - b. "Their case theory is unreasonable and not worthy of belief" (Facts prove that the defense case theory is full of holes; not *reasonable—rebuttal argument*) Impeachment concessions attacking the witness or the witness' facts would be part of the rebuttal argument.
- 4. Communication studies indicate that listeners who hear an arguer who fairly mentions the opposing view believe that arguer is "fairer"—perhaps some rebuttal could be anticipated in the primary argument for that reason.

- 5. However, wholesale shifting back and forth between primary argument and rebuttal argument could cause confusion, and confusion may equal *reasonable doubt*.
- 6. Looking at the Argument Structure above, we can remember that the "details proving" Topic/Subjects are essentially the *because* facts.
- 7. In direct and cross-examination, we are trying to present those "facts" or "points" which permit us to approach the desired argument. For cross-examination, we take these approach points and make them into a question; we organize them under Topic/Subjects to prevent confusion; and every Topic/Subject group of facts leads down to the ultimate argument.

#### Consider:

Ultimate Argument—Not credible because of bias

Topic/Subject 1—close neighbors

Approach points proving "close neighbors"

Topic/Subject 2 –working buddies

Approach points proving closeness of working together

8. Remember, it is generally not safe to ask the ultimate argument question to the witness in front of the jury.

Lawyer: You're biased, aren't you?

Witness: I am not.
Lawyer: Yes, you are.
Witness: No. I'm not.

- 9; In addition to getting a worthless exchange such as this, you are now stuck with the witness' answer to your question.
- 10. It is safer to ask the ultimate argument question rhetorically to the jury in closing argument.

Lawyer: Folks, do you think some bias may be entering that

witness' view of this event? Let's look at what we

know...

C. The NDAA designed an organizational system for use in both brainstorming for cross-examination and conducting the cross-examination.

- 1. The system combines brainstorming forms with an organizational form which can be used to conduct the actual cross-examination. However, you can brainstorm onto blank sheets and then organize.
- 2. The brainstorming forms.
  - a. You can begin the brainstorming with the form which compares and contrasts the opposing assertions with the actual situation the opposition has. This form has the word "Situation" at the top for you to label which situation you are comparing/contrasting, and the rest of the page is a two column form where you can compare "What would have been reasonable or logical in this situation?" against "What actually happened or occurred?"
    - 1. Your case theory and the opposing case theory cannot both be true. If your case theory is true and grounded in the evidence, then, at some point, the opposing case theory must depart the evidence and head toward improbability. By looking at what actually happened, you can compare that action against what "should have" happened or would reasonably/logically be expected to happen for the opposing case theory to have merit.
    - 2. Use this Situation form to think your way through the entire opposing case theory to develop the weaknesses and the credibility problems.
  - b. One of the brainstorming forms is actually a diagram of possible cross-examination areas. The diagram has a circle in the center labeled "Witness" which is surrounded by things to consider when thinking about what that witness must say to defeat you or what that witness has actually said. As you consider the possible or actual evidence by this witness, look at all the possible areas of cross-examination to see which ones can be used to construct the cross-examination.
  - c. Take the ideas you have developed with the comparison/contrast form and the brainstorming diagram and organize these thoughts by witness using the Brainstorming Ideas form. This form has a line where you can add the names of the opposing witnesses. The form has a two column design in case you wish to develop a

comparison-contrast cross-examination showing the ideal situation you might reasonably expect based on the opposing assertions and the less than ideal situation the opposition actually has. You may have several pages for each witness.

- 3. Organize the witness ideas onto the Approach Point form by breaking up the ideas into separate Topic/Subject areas. The Approach Point form has a separate box at the bottom for "ARGUMENT TO THE JURY".
  - a. Here you would put the *main argument point* you will make to the jury—bias, improbability, etc.
  - b. It is set off in a separate box as a visual reminder to you that you probably don't want to ask the witness about this directly.
- 4. The box at the top of the form has a section entitled "Topic/Subject Area of Cross-Exam:".
  - a. Actually this section is where you would write the Topic/Subject for the item you wrote in the "Argument to the Jury" box.
  - b. In the example where you would argue to the jury that the witness is biased because of being a *close neighbor* and because they are *working buddies*, on one Approach Point worksheet you would have bias as the "Argument to the Jury" with a Topic/Subject of *close neighbors* for that sheet; and you would have a separate worksheet with bias as the "ARGUMENT TO THE JURY" and *working buddies* as the Topic/Subject g for that sheet.
  - c. Below the Topic/Subject box at the top of the worksheet is one large box entitled "Fact Points". Here you would list all those facts—such as the *because* facts—which prove the Topic/Subject and lead you to the ultimate argument point at the bottom of the page.
    - 1. In listing the fact points, do not write out complete questions.
      - a. It takes too much time.

- b. You will tend to read the question as you have written it rather than being spontaneous.
- c. It is simple to turn a fact into a question by adding a tag line.
- d. Indent fact points which follow other fact points for visual organization and better flow of the questioning.

#### **Consider:**

#### **FACT POINTS**

Went in the truck....becomes
You went out there in the truck, didn't you?

- 2. Also in the FACT POINTS box is a place where you can reflect the *source* for the facts or an *exhibit* which assists in making the point.
  - a. A fact may relate to line 7, page 3 of a prior statement of that witness. Making that reference on this worksheet, reduces the problem of finding it later.
  - b. You may have developed fact points based on what you saw on a diagram or in a photograph. You can reflect which diagram or which photo for easy recall later.
- 3. You need a separate worksheet for each Topic/Subject. You may have two Topic/Subjects under Bias for this witness (*Close neighbors* and *Working buddies*)
  - a. Under *close neighbors* you may have too many fact points for one page, and the form contains a "Page\_\_\_\_\_of \_\_\_\_" at the top so you can keep your runover pages straight.
  - b. You can write the witness' name on the top of the form, or you can keep the worksheets in a separate file folder for each witness.

- 4. You would also have separate worksheets for each ultimate argument point you want to make.
  - a. You might have two for bias, and you may have others for other argument points.
  - b. The key is to "group" them by Topic/Subjects.
- 5. Also included below the "ARGUMENT TO THE JURY" box is the box labeled "ARGUMENT THEME FOR THESE FACT POINTS"
  - a. This theme is not like the theme you chose for Opening Statement where you may have said something like "Rape is a secretive crime"; "Greed is what brings us into this courtroom today"; or "If he couldn't have her, no one would have her".
  - b. The purpose for the "ARGUMENT THEME FOR THESE FACT POINTS" is to make you begin to think about how you are going to argue this Topic/Subject to the jury. Taking the time to think about a theme may produce other fact points or affect your choice of words in your questions. The theme for the questions would be a description or characterization of that set of questions or the reasonable inferences to be drawn from it.
  - c. Perhaps, in the case of a Topic/Subject such as "long time friends", a theme for the facts which you are going to produce could be "they go back a long way together".
  - d. The theme could become a transition/anticipatory question as the beginning of these fact points.

#### Consider:

Lawyer: You and the defendant go back a long way together, don't you..."

- D. The Approach Point form is both an organizational tool and an execution tool.
  - 1. It takes a bit of getting used to.
  - 2. It works best if you begin to use it and the other brainstorm forms as you read through the file.

- 3. While many defendants may never testify on their own behalf, the defendant is always a potential witness and you should prepare one for the defendant.
- 4. While you may not know *who* a witness might be, you may know *what type* witness you will encounter (alibi, etc.)
- 5. Develop the habit of establishing one point at a time to insure that the answer can be digested and the witness cannot give a literally true response which is different from what you meant the answer to be.

#### **National District Attorneys Association**

**Cross-Examination Formbook** 

# Approach Point<sup>SM</sup> Cross-Examination Planning and Organizational Forms

Organizing Your Fact Points to Approach the Persuasive Arguments

#### Reminders for Cross-Examination

- 1. Prepare
- a. Use the Approach PointSM form
- b. Work toward your closing argument.
- c. Save argument for argument.
- 2. Avoid objections.
  - a. Avoid argument--ask for facts
  - b. Have a good faith factual basis
  - c. Do not harass unnecessarily
- 3. Have a purpose but don't telegraph it. Remember your case theory.
- 4. Don't chase the defense theory unnecessarily.
  - a. Avoid strict chronology of the defense theory.
  - b. Determine the role of this witness to the defense theory.
- 5. Don't chase "rabbit trails" which lead nowhere.
- 6. Ask questions in short fact points whenever possible.
- 7. Be careful about "over controlling" the witness.
  - a. Witness conduct can be better than answers.
  - b. Note troublesome conduct for argument.
  - c. Think of a characterization for troublesome witnesses
  - d. Don't go to the court for help until the jury sees the witness conduct.
  - e. Switch to accusatory formats when control is a problem.
- 8. Listen to the answer.
  - a. Is it an answer to the question? Was it the *truth*; the *whole* truth; and *nothing but* the truth?
  - b. Did it provide better material than you had already?
  - c. Incorporate good points into the next question.
- 9. Prepare an impeachment predicate section for your trial notebook.
- 10. Avoid multi-fact or multi-element questions. The answers may mean nothing.
  - a. Be careful of "fact-lusions"--concepts which appear to be facts, but are really conclusions: *angry*, *upset*, *concerned*, etc.
  - b. Adjectives, adverbs and some nouns can expand concepts
  - c. Words such as "since" and "because" in questions can give a witness room to run. ("And you did that *because...*")
- 11. Secure concessions early and often. What must this witness concede which will advance your case theory or, to the contrary, make the witness less credible?
- 12. Keep your demeanor consistent with what the jury would find reasonable for this point in the trial. Don't change demeanor just because it is cross-examination.
- 13. Lock witnesses down before introducing inconsistencies.
- 14. Use transitions to help the jury follow you.
- 15. Avoid nit-picking cross-examination.
- 16. Avoid interrupting or overriding the witness' answers.
- 17. Avoid negatively worded questions.
- 18. Have a plan for when to quit, but keep listening for a better one than your plan.

#### Standards to Consider

#### NDAA 77.1 Fair Examination

 The examination of all witnesses should be conducted fairly, objectively, and with due regard for the reasonable privacy of witnesses.

#### NDAA 77.2 Improper Questioning

 Counsel should not ask a question which implies the existence of a factual predicate which he knows to be untrue or has no reasonable objective basis for believing is true.

#### • NDAA 77.5 Purpose of Cross-Examination

 The purpose of cross-examination is a good faith quest for the ascertainment of truth and should be conducted pursuant to this purpose.

#### NDAA 77.6 Impeachment and Credibility

 Counsel should not misuse the power of cross-examination or impeachment to ridicule, discredit, undermine, or hold the witness up to contempt, if counsel knows the witness is testifying truthfully. The credibility of any witness may be alluded to by a showing of any prior conviction.

#### Rule 601. General Rule of Competency

Every person is competent to be a witness except as otherwise provided in these rules.
 However, in civil actions and proceedings, with respect to an element of a claim or
 defense as to which State law supplies the rule of decision, the competency of a witness
 shall be determined in accordance with State law.

#### - Rule 602. Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support
a finding that the witness has personal knowledge of the matter. Evidence to prove
personal knowledge may, but need not, consist of the witness' own testimony. This rule
is subject to the provisions of rule 703, relating to opinion testimony by expert
witnesses.

#### - Rule 607. Who May Impeach

 The credibility of a witness may be attacked by any party, including the party calling the witness.

#### Rule 608. Evidence of Character and Conduct of Witness

- (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
- **(b) Specific instances of conduct.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness as to which character the witness being cross-examined has testified.
- The giving of testimony, whether by an accused or by any other witness, does not
  operate as a waiver of the accused's or the witness' privilege against self-incrimination
  when examined with respect to matters which relate only to credibility.

- Rule 609. Impeachment by Evidence of Conviction of Crime.
  - (a) General rule. For the purpose of attacking the credibility of a witness,
  - (1) evidence that a witness other than an accused has been convicted of a crime shall be
    admitted, subject to rule 403, if the crime was punishable by death or imprisonment in
    excess of one year under the law under which the witness was convicted, and evidence
    that an accused has been convicted of such a crime shall be admitted if the court
    determines that the probative value of admitting this evidence outweighs its prejudicial
    effect to the accused; and
  - (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.
  - **(b) Time limit.** Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.
  - (c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.
  - (d) Juvenile adjudications Evidence of juvenile adjudications is generally not
    admissible under this rule. The court may, however, in a criminal case allow evidence
    of a juvenile adjudication of a witness other than the accused if conviction of the
    offense would be admissible to attack the credibility of an adult and the court is
    satisfied that admission in evidence is necessary for a fair determination of the issue of
    guilt or innocence.
  - **(e) Pendency of appeal.** The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

#### Rule 610. Religious Beliefs or Opinions

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible
for the purpose of showing that by reason of their nature the witness' credibility is
impaired or enhanced.

#### Rule 611. Mode and Order of Interrogation and Presentation.

- (a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
- (b) Scope of cross-examination. Cross-examination should be limited to the subject
  matter of the direct examination and matters affecting the credibility of the witness. The
  court may, in the exercise of discretion, permit inquiry into additional matters as if on
  direct examination.
- (c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

#### Rule 612. Writing Used to Refresh Memory.

- Except as otherwise provided in criminal proceedings by section 3500 of title 18,
   United States Code, if a witness uses a writing to refresh memory for the purpose of testifying, either--
  - (1) while testifying, or
  - (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice,
- an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires, except that in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

#### Rule 613. Prior Statements of Witnesses

- (a) Examining witness concerning prior statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.
- **(b) Extrinsic evidence of prior inconsistent statement of witness.** Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801 (d)(2).

#### Rule 614. Calling and Interrogation of Witnesses by Court.

- (a) Calling by court. The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.
- **(b) Interrogation by court.** The court may interrogate witnesses, whether called by itself or by a party.
- **(c) Objections.** Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

#### Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially
outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the
jury, or by considerations of undue delay, waste of time, or needless presentation of
cumulative evidence.

#### Possible Objections

#### No good faith basis for question or underlying factual predicate; Assumes facts not in evidence

- Counsel must have a good faith basis for believing underlying predicate is true
- Question must not assume as true facts not in evidence

#### Argumentative Question

- · Argues with witness
- Requests witness to agree with case theory
- Harasses witness
- Elicits no new information

#### Beyond the Scope of Direct

Should be limited to subject matter of direct or go to credibility

#### Compound question; multiple elements

· Results in ambiguous answer

#### Misleading, confusing Question; Mischaracterizes Evidence

Questions should be clear and free from confusion or mistake

#### Repetitious Question; "Asked and Answered"

· Unnecessarily repeats facts or evidence

#### Incorrect, Improper Impeachment

- · Wrong impeachment
- Not materially inconsistent
- Irrelevant information

#### Danger of Unfair Prejudice

Question, while addressing relevant information, ventures into area where information
has danger of unfairly prejudicing jury.

#### Improperly Calls for a Conclusion; Speculation; Guess

Witness cannot answer factually

#### Answer is Unresponsive

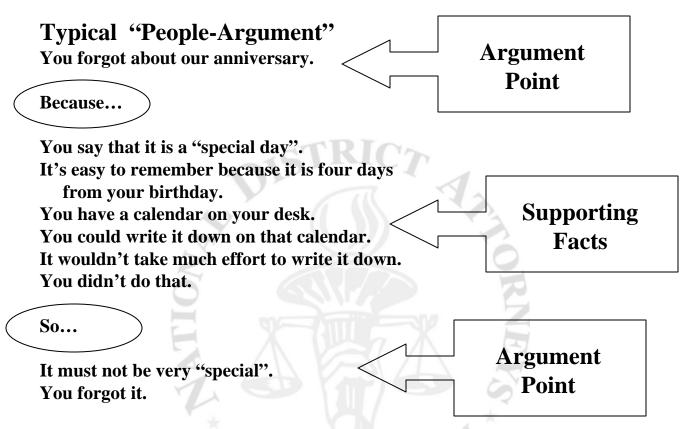
- Witness is volunteering unnecessary additional information
- Witness answered question different from one asked

#### Witness Control Factors

#### by John Tierney, NDAA Faculty

- Use leading questions beginning with:
  - "Do you/did you"; "Can you/could you"; "Will you/would you"; "Have you/had you"; "Are you/is it"; "Was it/were they"
- Make the witness agree with a short, simple thought
- Be patient. Make progress in short steps
- Select the proper form and tone of the question
- Work from specifics to generalities. Start with a single fact and add additional single facts in building block fashion.
- "Yanking the leash"
  - Repeat the question
  - Ask the witness to repeat your question
  - Ask the witness if the question was heard; if so, ask the witness what the question was
  - Provide the answer yourself
    - Q: Did you see the car? A: Ramble, ramble, ramble.
    - Q: Did you hear my question? A: Ramble, ramble, ramble.
    - Q: Then your answer is 'yes'"
  - Enter into an agreement with the witness
    - Q: I'm going to ask you some questions which can be answered yes or no. If you cannot answer my question yes or no, please let me know and I will rephrase the question for you.
  - Challenge the witness on the rambling.
    - Q: Did you see the car? A: Ramble, ramble, ramble.
    - Q: There is something which prevents you from answering yes or no? A: Not really.
    - Q: Then are you ready to answer my question yes or no?
  - Allow them to run in a small area and challenge them on it.
    - Q: Did you see the car? Ramble, ramble, ramble
    - Q: Is there anything else you want to tell us about that? A: Ramble, ramble.
    - Q: Anything else? A: Ramble, ramble.
    - Q: Anything else? A: Ramble.
    - Q: Anything else? A: No.
    - Q: Now let me ask you again, did you see the car?

### Cross-examination as the "because" part of typical argument structure



#### Same "argument" as cross-examination

You have an anniversary? Same date every year? Cross-examination It is close to your birthday. is the typical It is four days from your birthday. argument done in You remember your birthday? reverse order. The You have a calendar? supporting facts are That calendar is on your desk? presented while the You are at your desk every day? witness is on the You note things on that calendar? stand, and the Things you want to remember? "argument point" is Special things? made in closing. It's not hard to make those notes? You didn't make a note about the anniversary?

WITNESS:	PAGE OF			
TOPIC/SUBJECT AREA OF CROSS-EXAM:				
(Add here the topic which covers these fact points)				
FACT POINTS	SOURCE/EXHIBIT			
(List the short facts here which help you make the desired argument above. You do not have to write out questions. Each fact can be made into a question by the addition of a "tag line" such as "didn't you", "wasn't it", "isn't it a fact", etc.	(List here the source of the fact point or the particular exhibit which will help you with this set of fact points)			
Think of a good transition fact which can be used to set up these facts. You may want to depart from these facts if the witness gives you a better fact direction)				
ARGUMENT TO THE JURY:				
(Add here the argument you will make to t	the jury about this witness)			
ARGUMENT THEME FOR THESE FACT POINTS: (Add here a persuasive theme or description)	on for these fact points)			

Example of making "questions"

"There was damage to both cars,

"That damage is evidence,

wasn't there?"

isn't it?"

#### TOPIC/SUBJECT AREA OF CROSS-EXAM:

Incomplete analysis by witness

FACT POINTS SOURCE/EXHIBIT

Accident reconstruction is physics

Physics is "hard science"

Laws of physics are applied to automobile wrecks

Laws of physics are well known

This case is about a wreck

A two car wreck Head-on collision

There was damage to both cars

damage=evidence

There was damage to road surface

damage=evidence

There were skid marks

skid marks=evidence

There were injuries to the people

injuries=evidence

There were witnesses to the wreck

witnesses described wreck

descriptions could corroborate scientific analysis

Police were on the scene

on the scene within minutes

saw the cars

saw the road surface

saw the skid marks

saw the injuries

photographed all this "evidence"

made measurements

did triangulations

outlined the debris field

Police talked to witnesses on the scene

could determine witness vantage points

could evaluate witness vantage points

took witness statements from place where witness saw wreck

for better orientation and recall

You didn't go to scene with Officers (list them?)

You didn't go to scene with Witnesses (list them?)

#### ARGUMENT TO THE JURY:

Can't believe their expert; not follow scientific method; unreliable

ARGUMENT THEME FOR THESE FACT POINTS:

We didn't get our money's worth

WITNESS:	PAGE	OF
TOPIC/SUBJECT AREA OF CROSS-EXAM:		
FACT POINTS	SOURC	E/EXHIBIT
Then this must be true		
Point, and if this is true		
Then this must be true	)	
Additional points can be a and below current points be	~ ~	
ing reasonable, logical pro		
or reasonable, logical caus	_	•
ARGUMENT TO THE JURY:		
ARGUMENT THEME FOR THESE FACT POINTS:		

WITNESS:	PAGE <sub>.</sub>	OF
TOPIC/SUBJECT AREA OF CROSS-EXAM:		
FACT POINTS	sou	JRCE/EXHIBIT
Setting up a comparison/contrast	t cross	-exam
The defense theory without weaknesses is p But the defense must make concessions abo We can compare/contrast the defense theory the defense theory as it actually is.	out weak	inesses.
EXAMPLE 1: Didn't follow scientific method.  Accepted approach to validating theories.  Accepted approach produces reliable results Didn't follow scientific method.  Didn't follow accepted approach.  (Argument: Results less reliable)	SOB	
EXAMPLE 2: Impediments to vantage of Saw a person. Said "not defendant" Lighting important to see Very dim light Distance important to see Across the parking lot Cars in the way	point.	

ARGUMENT THEME FOR THESE FACT POINTS:

What would have been reasonable or logical in this situation?

What actually happened or occurred?

#### The Ideal

**Expert Witness** 

Use Scientific Method Follows accepted formats Wants complete investigation complete facts recheck facts? want first hand accounts want all documentation Consider source of facts Not reject any hypothesis Conduct exams fairly follow procedures keep log, journal (precise) confident in work not be afraid of findings write report showing significance

Reasonably compensated

#### Less Than Ideal

**Defense Witness** 

Not follow exact method
Deviated from formats
Incomplete investigation
didn't have all facts
rechecked facts?
did not have first hand
did not have all reports
Did not consider all hypotheses

Does not have notes
Did not write report
Did not provide prosecution
with results till testimony

Full price for incomplete work

**Typical Compare/Contrast Cross** 

WITNESS:	PAGE	OF
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#### TOPIC/SUBJECT AREA OF CROSS-EXAM:

#### **FACT POINTS**

Use Scientific Method Follows accepted formats Wants complete investigation complete facts recheck facts? want first hand accounts want all documentation Consider source of facts Not reject any hypothesis Conduct exams fairly follow procedures keep log, journal (precise) confident in work not be afraid of findings write report showing significance

"Now, Doctor, you consider yourself a scientist, don't you?"

"And a scientist would follow the scientific method, isn't that correct?"

Not follow exact method
Deviated from formats
Incomplete investigation
didn't have all facts
rechecked facts?
did not have first hand
did not have all reports
Did not consider all hypotheses

Does not have notes
Did not write report
Did not provide prosecution
with results till testimony

facts before introducing the contrast.

the reasonable or accepted

"But you didn't quite follow that method exactly, did you?"

#### **Simple Expansion of Concept**

Lock the witness in on

Ideal--Scientific Method
Ideal Result--More Reliable
Concession--Not follow Scientific
Method

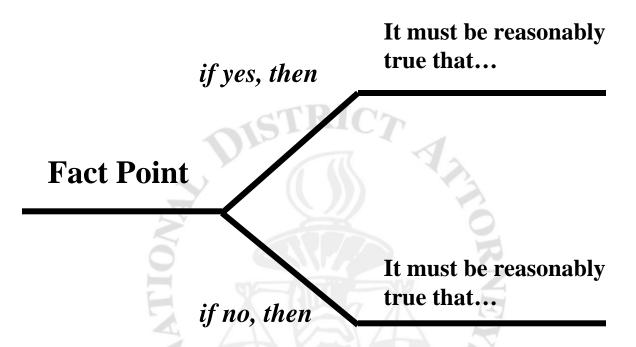
Concession Result--Unreliable

#### **Typical Compare/Contrast Cross**

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ARGUMENT THEME FOR THESE FACT POINTS:

Edit your fact point questions by considering the inferences which would flow from either a yes or no answer.

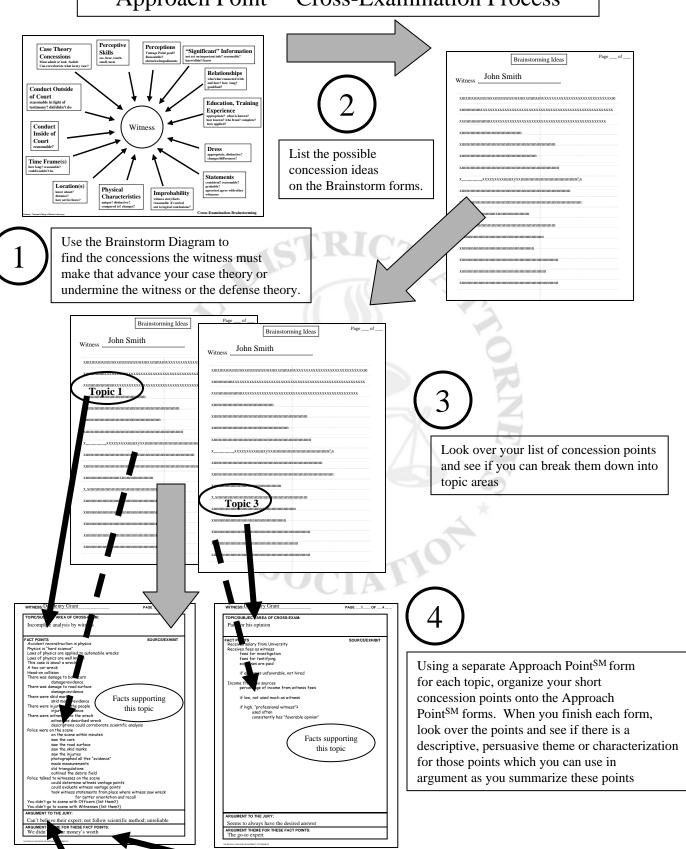


Testing your fact point questions by using the yes/no decision tree can help you determine whether you want to present that fact or whether you need to refine the wording of the fact point in light of the possible answers and their reasonable impact on both the prosecution and defense case theories.

By testing your fact points in this manner, you may be better able to surgically maneuver the witness toward the desired inferences. You may also be able to construct a fact point which results in yes or no answers which both produce a favorable inference in argument.

#### Education, Training **Cross-Examination Brainstorming** how known? who from? complete? "Significant" Information appropriate? what is known? who/what connected with agree/not agree with other appropriate, distinctive? Relationships not act on important info? reasonable? consistent? reasonable? probable? and how? how long? changes/differences? Experience Statements how applied? good/bad? Dress witnesses knew/didn't know out to logical conclusions? **Improbability** reasonable if carried witness story/facts obstacles/impediments **Perceptions** Vantage Point good? Reasonable? Witness Characteristics compared to? changes? unique? distinctive? **Perceptive** see, hear, touch, Physical smell, taste Skills Can corroborate what in my case? $\mathbf{Location}(\mathbf{s})$ how arrive/leave? Must admit or look foolish know about? distance? Conduct Outside testimony? did/didn't do Case Theory Concessions reasonable in light of Time Frame(s) how long? reasonable? Inside of Conduct reasonable? could/couldn't do of Court Court

#### The National District Attorneys Association Approach Point<sup>SM</sup> Cross-Examination Process



Topic leads to this argument in closing

Optional theme or description of these concession points

# Brainstorming Forms

What would have been reasonable or logical in this situation?



What would have been reasonable or logical in this situation?



What would have been reasonable or logical in this situation?



What would have been reasonable or logical in this situation?



What would have been reasonable or logical in this situation?



What would have been reasonable or logical in this situation?



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# Approach Point<sup>SM</sup> Organizational Forms



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